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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 951

ROBERT M. MUSE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ROBERT M. MUSE,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on December 18, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet reported, but is printed as Appendix A, *infra*. The opinion of the Court of Appeals in **Cohen v. United States**, No.

19,181, entered also on December 18, 1968, was relied upon by the Court of Appeals in the **Muse** opinion and is printed as Appendix B, *infra*.

JURISDICTION.

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on December 18, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., 1254 (1).

QUESTIONS PRESENTED.

I. Must Special Agents of the Internal Revenue Service, conducting a criminal tax investigation of a prospective defendant, advise him, prior to interrogating him, that he is the subject of a criminal investigation and warn him of his Constitutional rights?

II. Is the failure of a Special Agent of the Internal Revenue Service to advise a prospective defendant, prior to interrogation, that he is the subject of a criminal investigation, a misrepresentation so as to require suppression of evidence thereby obtained?

III. May a conviction stand where agents of the Internal Revenue Service obtain admissions from a defendant by telling him that they are conducting a civil tax investigation, when in fact they are conducting a criminal investigation?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived

of life, liberty, or property, without due process of law * * *."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his defense."

STATEMENT.

The petitioner was indicted in three counts for wilfully attempting to evade income taxes by filing false and fraudulent income tax returns for the years 1960, 1961 and 1962 in violation of Section 7201 of the Internal Revenue Code of 1954. Petitioner was found guilty by the trial Court (jury waived) and received a one year suspended sentence, was placed on probation for a period of two years and fined a total of $1500.00 (Tr. 32).[1]

Petitioner's motion to suppress evidence, filed prior to trial, requested the trial Court to suppress as evidence all documents and all statements, oral or written, which petitioner gave to agents of the Internal Revenue Service subsequent to the initiation of the criminal investigation which resulted in the present indictment. Petitioner urged in his motion to suppress and at the hearing held on said motion that once the Government launched an investigation designed to develop evidence against him for potential criminal prosecution, it was incumbent on the investigating agents to warn him of his Constitutional rights and that the Government was in fact conducting a criminal investigation (Tr. 27-28). Petitioner's motion was overruled after a hearing (Tr. 28). Petitioner waived

[1] The citation "Tr." refers to the transcript filed in this Court.

trial by jury, and the trial Court permitted petitioner and the Government to stipulate some of the evidence introduced at trial, but preserving for appeal the issues raised in petitioner's motion to suppress evidence.

The evidence introduced at trial by the Government was as follows:

(1) Petitioner's income tax returns for the years 1960, 1961 and 1962.

(2) Stipulation entered into between petitioner and the Government which provides in part that petitioner understated his income on his income tax returns for the taxable years 1960, 1961 and 1962 (Pars. 4, 5 and 6 of the stipulation; Tr. 31).

(3) Government Exhibit No. 4 which is a statement signed by petitioner, taken before Harold McGuire, Special Agent, Intelligence Division, and Albert E. Brody, Revenue Agent, Internal Revenue Service, on October 28, 1965 (Tr. 30, 31). This statement contains admissions by petitioner that he knowingly attempted to evade income taxes that he owed and set forth his reasons for filing his income tax returns. The same admissions had previously been made orally by petitioner to Harold McGuire, Special Agent, during several previous conferences (Stipulation, Par. 7). At trial, petitioner renewed his previous objections (motion to suppress) to the introduction into evidence of said statement, but it was received in evidence by the trial Court (Tr. 31).

The Court found petitioner guilty, basing his decision on the evidence agreed to in the Stipulation, the three tax returns, and the written statement signed by petitioner on October 28, 1965 (Tr. 32).

EVIDENCE RELATING TO THE MOTION TO SUPPRESS.

The evidence pertinent to this petition for writ of certiorari, which was adduced at the trial, at the hearing on the motion to suppress evidence and agreed to in the stipulation, may be summarized as follows:

Some time between the months of August and November, 1963, Harold F. McGuire, Special Agent, Intelligence Division, Internal Revenue Service (hereinafter sometimes referred to as "Special Agent McGuire") and Albert Brody, Revenue Agent, Internal Revenue Service (hereinafter sometimes referred to as "Revenue Agent Brody") investigated the income tax returns of David Muse, who is the older brother of petitioner (Tr. 13). Between the dates of November 20 and November 22, 1963, Special Agent McGuire and Revenue Agent Brody examined the records of Watson Manufacturing Company (Tr. 13). Watson Manufacturing Company was at that time and still is the employer of both David Muse and petitioner. Special Agent McGuire testified that their investigation in late November, 1963 of Watson Manufacturing's records disclosed that petitioner's name "appeared a bit more prominently, and [therefore] **Mr. Brody instituted or originated the charge against Robert prior to referring it to our office.**" (Emphasis added, Tr. 14.) Shortly thereafter, Revenue Agent Brody requisitioned petitioner's income tax returns (Tr. 3).

Revenue Agent Brody had two conferences in late 1963 or early 1964 with petitioner prior to his officially referring the case to the Intelligence Division of the Internal Revenue Service (Tr. 5-6). At the first conference, Brody told petitioner that the purpose of the conference was to determine his correct tax liability (App. A, p. A-2, *infra*; Tr. 4), but did not tell petitioner that there was any crim-

inal investigation of his income tax returns (App. A, p. A-3, *infra*; Tr. 5, 7). Several weeks later, Brody and petitioner had another conference concerning petitioner's tax liabilities.

Shortly after this second conference (February 24, 1964), Revenue Agent Brody referred petitioner's case to the Intelligence Division (Tr. 5-6, 12-13).

Special Agent McGuire testified that his duty was to investigate the criminal prosecutions (Tr. 24). McGuire stated that he first met petitioner on March 2, 1964 when a conference was held among petitioner, Revenue Agent Brody and himself. The Special Agent testified that **he did not tell petitioner that there was a criminal investigation going on** for the reason that "**we didn't know the extent that he understated**, so that at this point we were unaware whether there would be any criminal recommendation or not" (Emphasis added, Tr. 16-17). In addition, **petitioner was not warned that he had a right to a lawyer** (Tr. 17). The Special Agent said that he merely identified himself as a "Special Agent" (Tr. 25), and told petitioner that:

> "Under the Constitution of the United States, you have the right to refuse to answer questions or make any statements which may tend to incriminate you under the laws of the United States. Anything you say, any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States" (Tr. 26).

Revenue Agent Brody and Special Agent McGuire never told petitioner the true purpose of the investigation or gave warnings other than those already stated, at any time during the investigation (App. A, pp. A-2—A-3, *infra*; Tr. 7).

At the March 2, 1964 meeting, petitioner did not produce all the records requested by the agents, therefore,

a second conference was held in the Federal Building on April 29, 1964 (Tr. 18-19). At that time, petitioner brought his records, including expense analyses, bank records and records of individual jobs to Special Agent McGuire and Agent Brody (Tr. 9-10, 19). The Special Agent testified that he did not give petitioner any Constitutional warnings of any kind on April 29, 1964, but had previously asked petitioner to prepare the income and expense analyses (Tr. 16). As stated in the Government's brief filed in the Court of Appeals (page 4), Special Agent McGuire admitted that he **told** petitioner that "he wanted taxpayer to prepare some expense analyses to enable the agents to determine whether or not he had understated his income" (See Tr. 16). This statement was made to petitioner although McGuire testified that at the time of the March 2, 1964 conference, he merely did not know the "extent" of petitioner's understatements (Gov. brief in Ct. App., p. 4; Tr. 17).

Between April 29, 1964 and October 28, 1965, Special Agent McGuire, Revenue Agent Brody and petitioner had approximately six to ten conferences (Tr. 20, 5). On or about October 14, 1965, Special Agent McGuire asked petitioner to sign a statement, but petitioner stated he was undecided whether to sign a statement. At that time, the Special Agent jotted down some of the things he wanted included in the statement. Petitioner asked McGuire what direction the investigation was going, and he told petitioner that it looked as if criminal prosecution would be recommended (Tr. 20-21). At no time previous to October 14, 1965 did either of the agents advise petitioner that they were conducting a criminal investigation (Tr. 22; App. A, p. 3-A, *infra*).

Subsequently, Special Agent McGuire and petitioner composed the statement together, which McGuire wrote in longhand. On October 28, 1965, the statement was typed

and signed by petitioner. It was stipulated at trial that the statement contains admissions that were previously made by petitioner during the conferences between the agents and petitioner (Par. 7, Stipulation; App. A, p. A-2, *infra*).

The October 28, 1965 statement, all records given the agents by petitioner, and all oral admissions made by petitioner to the agents which were later embodied into the written statement were the subject of petitioner's original motion to suppress which was overruled by the trial Court (Tr. 28). The pre-trial objections were again made when the government offered the written statement into evidence at the time of trial (Tr. 30-31). In addition, the stipulation specifically provided that the petitioner reserved his right to appeal the trial Court's denial of his motion to suppress (See Par. 7).

REASONS FOR GRANTING THE WRIT.

This case squarely presents the important and recurring issue of whether Special Agents of the Intelligence Division, Internal Revenue Service, are required to advise a prospective defendant in a criminal tax evasion case of his constitutional rights (including his right to counsel) when, without his knowledge, his assistance is not being sought to ascertain his proper civil debt to the Government, but to aid the Government to convict him of a crime. See Mr. Justice Douglas' dissent from a denial of a petition for certiorari in **Thomas v. United States**, 386 U. S. 975, wherein he states that this "is a coercive examination of a taxpayer at a critical preliminary hearing . . . and the question presented apparently is a recurring one."

The Court of Appeals held that the petitioner's constitutional rights were not violated for the reasons that 1) the petitioner's statements were not obtained by misrep-

resentation, fraud or coercion, but were voluntarily given; and 2) the petitioner was not in custody when he was questioned by the Special Agent. The rationale behind the Court's decision is found in its opinion rendered on the same day in **Cohen v. United States**, No. 19,181, 8 Cir., Dec. 18, 1968, which is printed here as Appendix B, *infra*.

Negative Deception by Government Agents Held by the Court Below Not to Be a Misrepresentation Requiring Suppression of Evidence.

In its opinion, the Court of Appeals acknowledges that its decision is in conflict with several District Court opinions holding that Special Agents **do** have an affirmative duty to inform a prospective defendant, prior to interrogation, that he is the subject of a criminal investigation (App. B, pp. A-6—A-7, *infra*).[2] The Court of Appeals holds that Special Agents, while conducting a criminal investigation, are not required to inform a defendant that he is in fact the subject of a criminal investigation. All the Court of Appeals requires of government agents is that they "not **affirmatively** mislead a taxpayer into believing that the investigation is exclusively civil in character . . ." (App. B, p. A-7, *infra*).

The Court of Appeals' opinion fails to recognize the important difference between 1) failure on the part of a special agent to disclose the true purpose of his investigation at its inception when suspicion of any criminal wrongdoing exists **and** 2) the discovery of criminal

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[2] **United States v. Wheeler**, W. D. Pa., 149 F. Supp. 445, 450, rev'd on other grounds, 256 F. 2d 745 (3 Cir.), cert. denied, 358 U. S. 873; **United States v. Walrich**, S. D. N. Y., 129 F. Supp. 528. Although fraud was suspected from the outset the agents told the defendant that it was a routine examination. The court held that this was a misrepresentation. **United States v. Guerrina**, E. D. Pa., 112 F. Supp. 126, modified, 126 F. Supp. 609.

wrongdoing in the course of a routine tax investigation (App. B, p. A-7, *infra*). Thus, although the Court of Appeals acknowledges that disclosures by defendants to Special Agents and Revenue Agents must be **voluntary** and must not be induced by **misrepresentation**, it condones "negative deception" by Special Agents (i. e., failure to tell defendant that the Government is in fact conducting a criminal investigation).

If this Court does not grant certiorari here, the decision below will be authority for Government agents to practice "negative deception" without it being considered an improper "misrepresentation". Petitioner submits that such misconduct and mis-use of administrative procedures in aid of a criminal prosecution has previously been severely criticized by this Court and should not be condoned here. **Abel v. United States,** 362 U. S. 217, 226 (1960);[3] **Reisman v. Caplin,** 375 U. S. 440.[4]

Non-custodial Interrogation of Defendant by Special Agents Where Inquiry Has Reached the Accusatory Stage Requires Miranda Warnings.

The Court below holds that Special Agents of the Internal Revenue Service are not required to warn a prospective defendant, prior to interrogating him, of his constitutional rights (**Miranda** warnings), when said de-

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[3] The Court of Appeals, quoting from an IRS News Release, dated November 26, 1968, states that "previously [meaning prior to November 26, 1968], the Special Agent identified himself and described his function at the first meeting with the taxpayer . . ." (App. B, p. A-13, *infra*). Obviously, the Special Agent here did not do this.

[4] If the decision below is permitted to stand, petitioner submits that every citizen in these United States would be well advised never to cooperate in any way with Revenue Agents or Special Agents. If the Revenue Agents took legal steps to require production of records, etc., a person could obtain some assurance that the agents were not conducting a criminal investigation or find out that he is, in fact, the subject of a criminal investigation.

fendant is **not in custody** (App. B, p. A-15, *infra*). This holding, as acknowledged by the Court of Appeals, is in conflict with Federal District Court decisions in the Third, Fifth, Seventh and Tenth Circuits (App. B, p. 8, *infra*). See **United States v. Turzynski**, N. D. Ill., 268 F. Supp. 847; **United States v. Wainwright**, D. Colo., 284 F. Supp. 129; **United States v. Kingry**, N. D. Fla., 67-1 U. S. T. C., § 9262; **United States v. Gower**, M. D. Pa., 65-2 U. S. T. C., § 9752; **United States v. Schoenburg**, D. Ariz., 67-1 U. S. T. C., § 9393; **United States v. Dickerson**, N. D. Ill., 291 F. Supp. 633.

The lower Court's holding that "custody" is controlling is also contrary to the test previously enunciated by this Court. The test is not whether a person is in custody, but is whether a suspect has "voluntarily" waived his constitutional rights and privileges. This Court has held that it is impossible to "voluntarily" waive a right or privilege you are unaware you possess. **Miranda v. Arizona**, 384 U. S. 436, 462. Here, even though petitioner was not in jail, he did not voluntarily and knowingly waive his constitutional rights for the reason that he was not told he was the subject of a criminal investigation and was not warned of his rights. As stated by Judge Will in **United States v. Turzynski**, N. D. Ill., 268 F. S. 847, 851:

> "Whether a suspect is induced to incriminate himself by a combination of ignorance of his rights and the coercive atmosphere of custody, or by ignorance of his rights and combined with the inference that the purpose of the interrogation is simply to ascertain his dollars and cents liability for taxes, the result is the same, an involuntary self-incrimination."

Petitioner submits that the inception of the adversary process was the core of this Court's concern in **Escobedo v. United States**, 378 U. S. 478; **Miranda**, cited *supra*; and **Mathis v. United States**, 88 S. Ct. 1503. See the dissent-

ing opinion in **Miller v. California,** 88 S. Ct. 2258. While custody may have a coercive effect, it is also an easily recognizable point at which the adversary process can be said to have begun. **Miranda v. United States,** 384 U. S. at 477. Here, as the Court below found, petitioner was being investigated for purposes of criminal tax prosecution (App. B, pp. A-5, A-8, A-15, *infra*). For this reason, petitioner was entitled to know such fact and warned of his Constitutional rights just as any other suspect being interrogated in contemplation of his possible criminal prosecution. The adversary process had clearly begun. The fact that petitioner was not in custody is not controlling. **Massiah v. United States,** 3[illegible] U. S. 201.

Although relied [illegible] Court below, the Court's opinion fails to mention this Court's holding in **Massiah,** the Fifth Circuit's holding in **Windsor v. United States,** 5 Cir., 389 F. 2d 530; and the decision in **United States v. Fruchtman,** N. D. Ohio, 282 F. S. 534. All three cases concern **pre-custodial** interrogations of defendants.

In **Massiah,** this Court held that the defendant's Fifth and Sixth Amendment rights were violated by use against him of incriminating statements which he made to a co-defendant, after indictment, but while defendant was free on bond. This Court reversed the conviction for the reason that Government agents had deliberately elicited his admission in the absence of his counsel. However, this Court said it made no difference that the defendant was not in custody, holding that if such a rule is to have any efficacy it must apply to indirect and surrepetitious interrogations as well as those conducted in the jail house.

As stated, the lower Court's decision is in conflict with the Fifth Circuit's decision in **Windsor v. United States,** 5 Cir., 389 F. 2d 530. In **Windsor,** defendant's Dyer Act

conviction was reversed for the reason that the complete **Miranda** warnings (i. e., right to counsel during interrogation) were not given. Defendant was not in custody at the time of the interrogation and was even told by Government agents that he was not under arrest and was not being detained in any way. Thus, the Fifth Circuit does not consider "custody" controlling.

In **Fruchtman**, the defendant was subpoenaed to testify before a grand jury. He was not a potential defendant in a criminal case prior to his testifying. During his testimony, the Court held that it should have become apparent to the prosecutor that the witness was a potential defendant and therefore the interrogation should have been stopped until defendant was warned of his rights. The Court suppressed defendant's grand jury testimony even though defendant was not in custody during the time of his interrogation.

The Court below, relying on **United States v. Squeri**,[5] 2 Cir., 398 F. 2d 785, adopts the view that the Government is not "compelling" a defendant to incriminate himself so long as the defendant is not placed in custody (App. B, pp. A-9—A-11, *infra*). This view, however, fails to recognize the pressures imposed upon a person when he is confronted with a visit from Government agents, told his tax problems are civil in nature, but not told that he is under criminal investigation. Since the person is lead to believe that it is merely a civil tax investigation and that he can be legally forced to comply with certain requests for records, such person is certainly "compelled" to do things that he might not do, if he knew the true nature of the investigation.

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[5] In **Squeri**, the Court merely held that no warnings need be given during routine audits. Further, the Court found no deceit by the agents and the defendant was told that he was under criminal investigation as soon as the agents actually considered prosecution.

Petitioner urges this Court to review the practices of the Special Agents of the Internal Revenue Service in obtaining admissions and records from unknowing suspects.

CONCLUSION.

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX.

He had been investigating the returns of the defendant's brother. He met twice with the defendant before referring the case to the Intelligence Division on February 24, 1964. He told the defendant that the purpose of the investigation was to determine the defendant's correct tax liability.

On March 2, 1964, the Revenue Agent and the Special Agent met with the defendant in the Special Agent's office. The Special Agent introduced himself as a Special Agent and read the following warning:

> "Under the Constitution of the United States you have the right to refuse to answer questions or make any statement which may tend to incriminate you under the laws of the United States. Anything you say, any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States."

The defendant replied that he understood. Several additional visits were made between the March meeting and October 14, 1965. Incriminating statements and records were obtained at some of them. At the latter meeting, the Special Agent asked the defendant to sign a written statement. The defendant asked "what direction the investigation was going" and whether he needed a lawyer. The Special Agent replied that "it looked as if criminal prosecution would be recommended; that it was for the defendant to decide about retaining a lawyer and that the Internal Revenue Service Agents could not advise him one way or the other on the subject."

On October 28, 1965, the defendant signed a statement containing oral admissions made by him during the course of the several meetings. In substance, the defendant admitted that he knew that each return understated his income by "several thousand dollars" and that he had filed the incorrect returns to protect his brother against an examination.

No statements as to the purpose of the investigation, nor warnings other than those stated, were given to the defendant at any time during the investigation.

We are convinced here, as we were in *Cohen v. United States,* No. 19181, 8th Cir. Dec. 18, 1968, decided today, that the District Court did not err in receiving the defendant's oral and written statements in evidence. The defendant was not in custody and the statements were not obtained by misrepresentation, fraud or coercion, and were voluntarily given. The defendant's constitutional rights under the Fifth and Sixth Amendments were not violated.

Affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

No. 19,181

Jerry M. Cohen,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[December 18, 1968.]

Before Matthes, Mehaffey and Heaney, Circuit Judges.

Heaney, Circuit Judge.

The defendant was indicted in three counts for willful failure to file individual income tax returns for 1960, 1961 and 1962 in violation of § 7203 of the Internal Revenue Code of 1954, and in eight counts for knowingly filing false employer's quarterly tax returns for 1961 and 1962 in violation of § 7201. He was found guilty on all counts and was sentenced.

The question raised here is whether the District Court erred in refusing to exclude evidence obtained from the

defendant by Internal Revenue Service Agents—evidence which the defendant contends was secured by misrepresentation and in violation of his constitutional rights under the Fifth (*Miranda*)[1] and Sixth (*Escobedo*)[2] Amendments. We affirm.

A Special Agent,[3] assigned to investigate the defendant's failure to file tax returns, telephoned the defendant on August 19, 1963, and told him he was a Special Agent who investigated irregularities in taxes. He asked the defendant a few questions and requested an appointment.

On September 9, 1963, the Special Agent went to the defendant's office and told him that the St. Louis Office of the Internal Revenue Service had no record of income tax returns filed by the defendant and asked where they had been filed. The defendant replied that he had filed returns in Detroit in 1959, but had not filed returns after that. This was the first time that the Special Agent knew that no returns had been filed. The Special Agent then told the defendant that a Revenue Agent had been assigned to "examine his income tax liability, if any" and that the

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[1] *Miranda v. Arizona,* 384 U. S. 436 (1966).

[2] *Escobedo v. Illinois,* 378 F. 2d 767 (1964).

[3] Revenue Agents undertake routine civil audits in an attempt to ascertain if, in fact, there has been a deficiency. The Revenue Agent, in the normal course, is not searching for evidence of fraud. If, however, the Revenue Agent discovers the possible existence of fraud, the matter is turned over to his superiors who refer the case to the Intelligence Division. The Intelligence Division then determines whether a fraud investigation is warranted. If a decision is made to commence a fraud investigation, a Special Agent is placed in charge. The Special Agent is a trained criminal investigator. His duty is to determine whether the taxpayer has, in fact, committed fraud. Both the Special Agent and Revenue Agent have virtually unreviewable discretion to dismiss the criminal aspects of a case while they are in charge. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid,* 76 Yale L. J. 1, 34-35 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation,* 44 Taxes 660, 661-62 (1966).

Revenue Agent would make the tax examination, and that he, the Special Agent, would conduct an audit. The Special Agent also learned, at this meeting, that the defendant was the sole proprietor of the United Heating Service.

The agents visited the defendant's office singly or together on September 26, 1963, June 3, 1964, September 9, 1964, March 16, 1965, August 10, 1965 and September 16, 1965. On most occasions, they obtained records used against the defendant.

It was at the second visit, on June 3, 1964, that the defendant was first advised that he need not answer any questions which tended to incriminate him. He responded to this warning by saying that he understood but saw no reason not to answer. The warning was repeated at an August 10, 1965 meeting at the defendant's office. The defendant again answered the questions put to him by the agents.

On April 6, 1966, the taxpayer went to the Internal Revenue Service office for a formal interview. He did so in response to a letter which told him he could bring an attorney. He was advised for the first time at this meeting that the Special Agent was a criminal investigator. He was also advised for the first time that he had a right to counsel, but was not told that counsel would be provided for him.

On the basis of this record, we are convinced that the defendant's records and statements were not obtained by misrepresentation, fraud or coercion, as those terms were understood pre-*Escobedo* and *Miranda,* and were voluntarily given in the same sense.

While there is District Court authority for the view that Internal Revenue Service Agents have an affirmative duty to inform a taxpayer that he is the subject of a

criminal investigation in circumstances comparable to those here,[4] the United States Courts of Appeals have uniformly held to the contrary.[5] We follow the latter cases but reiterate our warning in *White* v. *United States*, 395 F.2d 170 (8th Cir. 1968), that agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges.

We turn to the question of whether the failure to give a *Miranda* warning, or a modified version thereof, made the evidence obtained inadmissible.

We indicated by way of dictum in *Frohmann* v. *United States*, 380 F. 2d 832 (8th Cir. 1967), and held in *White*, that a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service conducting a pre-custody investigation need not warn a taxpayer of his constitutional rights as enunciated in *Escobedo* and *Miranda*. We did not distinguish in either case between

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[4] *United States v. Wheeler*, 149 F. Supp. 445, 450 (W. D. Pa. 1957), *rev'd on other grounds*, 256 F. 2d 745 (3d Cir.), *cert. denied*, 358 U. S. 873 (1958):

> "* * * [T]he law distinguishes between failure on the part of a government investigator to disclose the purpose of his investigation at its inception when suspicion of criminal wrongdoing exists and the discovery of criminal wrongdoing in the course of a routine investigation. * * *"

The former constitutes misrepresentation. *United States v. Walrich*, 129 F. Supp. 528 (S. D. N. Y. 1954). Although fraud was suspected from the outset the agents told the defendant that it was a routine examination. The court held that this was a misrepresentation. *United States v. Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1953), *modified*, 126 F. Supp. 609 (E. D. Pa. 1955).

[5] *United States v. Mackiewicz*, 68-2 USTC, ¶9461 (2d Cir. July 10, 1968), *cert. denied*, 37 U. S. L. Week 3158 (U. S. Oct. 28, 1968); *United States v. Sclafani*, 265 F. 2d 408, 414 (2d Cir. 1959), *cert. denied*, 360 U. S. 918 (1960); *United States v. Frank*, 245 F. 2d 284, 286 (3d Cir. 1957), *cert. denied*, 355 U. S. 819 (1957). See *Hanson v. United States*, 186 F. 2d 61, 65-66 (8th Cir. 1950).

investigations conducted by the Audit Division, usually civil, and those conducted by Special or Intelligence Agents, usually criminal. Nor did we attempt to draw a line between the investigatory or accusatory stage of such investigations.

We are now faced with the question of whether we will apply the dictum in *Frohmann* and the holding in *White* to pre-custodial inquiries by Special Agents of the Internal Revenue Service, including situations in which the inquiries may have reached the accusatory stage.

District Courts in the Tenth, Fifth, Third and Seventh Circuits have held that warnings are required at the point the investigation reaches the accusatory stage or becomes criminally oriented. They have indicated that this stage is often reached when a Special Agent is assigned to the case.[6] *United States v. Turzynski*, 268 F. Supp. 847 (N. D. Ill. 1967), is recognized as the leading case for this point of view.

In *Turzynski*, as a result of a civil investigation, the taxpayer's case was turned over to the criminal division of the Internal Revenue Service. The taxpayer was not informed of this shift of focus and continued to furnish the Special Agent with records and interviews. The taxpayer was given no warning of possible criminal prosecution until the investigation was completed and he was sent a letter inviting him to a formal conference. The letter informed him that he could bring counsel. The taxpayer reported without counsel. The agents, however, refused

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[6] *United States v. Wainwright*, 284 F. Supp. 129 (D. Colo. 1968); *United States v. Kingry*, 67-1 USTC, ¶ 9262 (N. D. Fla. January 6, 1967); *United States v. Gower*, 65-2 USTC, ¶ 9752 (M. D. Pa. August 27, 1965). See, Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 Iowa L. Rev. 1074, 1111-1116 (1968); Comment, 53 Iowa L. Rev. 957, 962 (1968).

to continue until the taxpayer retained counsel. The court said:

> "* * * Once a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges. * * *
>
> * * * * * * *
>
> "To hold otherwise would lead to the anomolous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes."

Id. at 850-51.

The Courts of Appeals, that have considered the matter since *Escobedo,* have held, in a variety of fact situations, that warnings need not be given in pre-custodial interview.[7] The reasoning of Judge Lumbard in *United States*

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[7]

FIRST CIRCUIT:

Taglianetti v. United States, 68-2 USTC, ¶ 9479 (1st Cir. July 18, 1968), *petition for cert. filed,* 37 U. S. L. Week 3081 (U. S. Aug. 28, 1968) (No. 446); *Spinney v. United States,* 385 F. 2d 908

v. Squeri, 398 F. 2d 785 (2d Cir. 1968), appears to reflect the views (often unexpressed) of the Circuits that have considered the question:

> "* * * [W]e reject the view, adopted by a few district courts in other circuits, that IRS agents must give the *Miranda* warnings, even though there is

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(1st Cir. 1967); *cert. denied*, ... U. S. ..., 19 L. Ed. 2d 981 (1968); *Schlinsky v. United States*, 379 F. 2d 735 (1st Cir.), *cert. denied*, 389 U. S. 920 (1967); *Morgan v. United States*, 377 F. 2d 507 (1st Cir. 1967).

In each of these cases, the defendant was warned of his right to remain silent and was told that anything he stated could be used against him. In none of them was he advised of his right to counsel or to have counsel appointed for him. The language of the Court in *Spinney* indicates, however, that it would not necessarily require that any of the *Miranda* warnings be given to a taxpayer being interviewed in home or an Internal Revenue Service office.

> "* * * [W]here one is legally free, albeit at the risk of unpleasant consequences, to reject the government's invitation to appear and participate in an I. R. S. interview, the requirements enumerated in *Miranda* do not apply. * * *
> "'. . . the background of *Miranda* demonstrates that it was the product of the Court's concern with the difficulty of protecting persons in the custody of the police from coercive interrogation tactics carried on in secret. * * * Defendant makes no assertion, nor could he, that he was not free to walk out of the Internal Revenue office at any time. * * *'"

Spinney v. United States, 385 F. 2d at 910.

SECOND CIRCUIT:

United States v. Marcus, 68-2 USTC, ¶ 9599 (2d Cir. September 20, 1968); *United States v. Dawson*, 400 F. 2d 194 (2d Cir. 1968); *United States v. Squeri*, 398 F. 2d 785 (2d Cir. 1968); *United States v. Mackiewicz*, 68-2 USTC, ¶ 9461 (2d Cir. July 10, 1968), *cert. denied*, 37 U. S. L. Week 3158 (U. S. Oct. 28, 1968).

In *Mackiewicz* and *Squeri*, the defendant was warned of his right to remain silent but was not advised of his right to counsel. In *Dawson*, the defendant was warned of his right to remain silent and to have counsel at the first two interviews. At subsequent interviews, no warnings were given and defendant made damaging admissions. In *Marcus*, it is not clear whether or not the defendant was warned of his right to remain silent, but the defendant was not warned of his right to counsel. The Court, in all four cases, went beyond the facts of the particular case and stated that where the defendant was aware he was the subject of a

> no custodial interrogation, if the investigation has reached the accusatory stage. * * * The Fifth Amendment privilege prohibits the government from *compelling* a person to incriminate himself. It was the compulsive aspect of custodial interrogation, and

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tax investigation and where the interviews were conducted in non-custodial situations, *Miranda* warnings are not required.

FOURTH CIRCUIT:

United States v. Mancuso, 378 F. 2d 612 (4th Cir.), *modified*, 387 F. 2d 376 (4th Cir. 1967), *cert. denied*, 390 U. S. 955 (1968).

The defendant was accompanied by his attorney and accountant at two Internal Revenue Service interviews where he made incriminating statements. The defendant was warned he could refuse to answer the questions which could incriminate him, but was not warned of his right to counsel. The Court, rather than base its decision on the narrow ground that counsel was, in fact, present, chose to hold that neither *Miranda* nor *Escobedo* are applicable to a tax investigation where the purpose is to determine whether or not additional taxes due or a crime has in fact been committed.

FIFTH CIRCUIT:

Mathis v. United States, 376 F. 2d 595 (5th Cir. 1967), *rev'd*, 391 U. S. 1 (1968).

The defendant was interviewed in connection with a routine audit while he was confined in the Florida State Penitentiary on an unrelated conviction. No warnings were given and the Circuit Court affirmed on the basis that no warnings were required where the agent was conducting a routine audit even though there was a possibility that fraud would be uncovered. The Supreme Court reversed and held the interview must be suppressed as it was the product of an *in custody* interrogation.

SIXTH CIRCUIT:

United States v. Maius, 378 F. 2d 716 (6th Cir.), cert. denied, 389 U. S. 905 (1967).

The defendant was warned that he had the right to remain silent but not that he had the right to counsel. The Court expressed grave reservations as to its holding:

> "* * * A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by

> not the strength or extent of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning. We believe that the presence or absence of compelling pressures, rather than the stage to which the government's investigation has developed, determines whether the *Miranda* requirements apply to any particular instance of questioning."

Id. at 790.

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such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial."

Id. at 719.

SEVENTH CIRCUIT:

United States v. Mansfield, 381 F. 2d 961 (7th Cir.), *cert. denied,* 389 U. S. 1015 (1967).

The defendant was warned at the initial interview that there was a possibility of criminal prosecution and that he could remain silent and refuse to produce his records. He was not warned of his right to counsel. No further warnings were given at subsequent interviews. The Court held that the tactical decision not to give further warnings did not render inadmissible records obtained at subsequent interviews.

NINTH CIRCUIT:

Selinger v. Bigler, 377 F. 2d 542 (9th Cir.) (Per Curiam), *cert. denied,* 389 U. S. 904 (1967); *Rickey v. United States,* 360 F. 2d 32 (9th Cir.), *cert. denied,* 385 U. S. 835 (1966); *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965), *cert. denied,* 384 U. S. 1011 (1966).

All three of these cases arose post-*Escobedo* but pre-*Miranda*. In *Kohatsu,* the defendant was not warned of his right to retain or have counsel appointed, but was warned of his right to remain silent and not to produce any records. The warning, however, was given by a Special Agent after the defendant had already made incriminating statements and turned over incriminating records to a Revenue Agent. The Court held that *Escobedo* was not applicable as this was an investigation to determine whether a crime had been committed in fact. Revenue Agents are not required to inform the taxpayer of the shift to a criminal investigation where a routine investigation develops evidence of fraud because it is inherent in the investigation that the agents will pursue such evidence. The other two cases relied on this reasoning.

On November 26, 1968, the Internal Revenue Service announced a revised procedure for advising a taxpayer of his rights during an investigation conducted by a Special Agent of the Internal Revenue Service, Intelligence Division.

> "* * * At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.
>
> "Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the prelimary stage.
>
> "IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.
>
> "A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U. S. Commissioner."

IRS News Release IR-949, November 26, 1968.

The procedures outlined in the instructions are a step forward in tax administration and will be among the factors considered by this Court in determining whether the nature of an investigation has been misrepresented.

They fall short, however, of extending to the taxpayer the protections set forth in *Escobedo* and *Miranda*.

The administration of the new Internal Revenue Service procedure will raise practical problems. In some instances, the Revenue Agents will have obtained the evidence necessary to obtain a conviction before referral; in others, Revenue Agents might be encouraged to expand their inquiries. Furthermore, a determination as to when the right to warnings attach should not depend on the title and function of the official investigator. *United States v. Mathis*, 391 U. S. 1 (1968); *United States v. Mackiewicz*, 68-2 USTC ¶ 9461 (2d Cir. July 10, 1968); *cert. denied* 37 U. S. L. Week 3158 (U. S. Oct. 28, 1968); Note, 33 U. Chi. L. Rev. 134, 147-48 (1965).

To meet these problems, Law Review commentary recommends that warnings be optional with the Internal Revenue Service depending on whether there is a desire to preserve the right to use any evidnce obtained in a criminal proscution. If it had this desire, full warnings would be required.[8]

If a taxpayer is entitled to be warned of his Fifth and Sixth Amendment rights in a non-custodial tax investigation, the Law Review recommendations would be meritorious. While the suggested procedure would impose additional administrative tasks,[9] it would be fair to the taxpayer and susceptible of review. We do not require it, however, because we do not believe that the taxpayer is so entitled.

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[8] *Duke, supra* note 3, at 39; *Hewitt, supra* note 3, at 697; Lipton, *Constitutional Rights in Criminal Tax Investigation*, 53 A. B. A. J. 517, 521 (1967); Note, 33 U. Chi. L. Rev. 134, 147-48 (1965).

[9] "To inject the full *Miranda* warning at this stage of the proceedings would merely clutter an already difficult administrative task." *United States v. Mackiewicz, supra.* See, *Kohatsu v. United States, supra; United States v. Sclafani, supra.*

To summarize, we hold that the Internal Revenue Service Agents, Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights.

We also reemphasize the views that we expressed in *White* that disclosures to Internal Revenue Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud or misrepresentations.

Affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 19,259.

September Term, 1968.

Robert M. Muse,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 18, 1968.

Order entered in accordance with Opinion.

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 951

ROBERT M. MUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. App. A1–A3) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1968. (Pet. App. A16.) The petition for a writ of certiorari was filed on January 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence used at petitioner's trial for tax evasion was obtained from him in violation of his con-

333-450—69

stitutional rights because the investigating special agent of the Internal Revenue Service failed to describe his inquiries as a criminal investigation and to advise petitioner that he had a right to have an attorney present.

STATEMENT

After waiving a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Missouri on all counts of a three-count indictment charging that he had wilfully sought to evade income taxes by filing false and fraudulent individual income tax returns for the years 1960, 1961 and 1962. He was sentenced to one year and $1,500 fine; the term of imprisonment was then suspended for a two year probationary period.

The only question here concerns the district court's denial, affirmed by the United States Court of Appeals for the Eighth Circuit on appeal, of petitioner's pretrial motion to suppress evidence given by him to Internal Revenue agents during the course of interviews (Tr. 28). Petitioner himself did not testify at the proceedings on the motion to suppress; the only witnesses called were Internal Revenue Agent Brody and Special Agent McGuire of the Intelligence Division, Internal Revenue Service (Tr. 2, 12).

Agent Brody testified (Tr. 2–11) that he requisitioned petitioner's returns in late 1963 or early 1964, on the basis of information obtained in his investi- tion of petitioner's brother's tax returns. Thereafter, he interviewed petitioner twice, telling him that his purpose was to determine petitioner's correct tax liability. Shortly after the second interview, Brody

referred the case from the Audit Division to the Intelligence Division for consideration of the possibility that fraud had occurred. It was then that he first specifically discussed petitioner with Special Agent McGuire, although the two had previously cooperated in investigating petitioner's brother and, during that investigation, questions had arisen as to whether certain income was petitioner's or the brother's (Tr. 5–6, 24).

Special Agent McGuire testified (Tr. 12–26) that he began investigating petitioner's returns after Agent Brody referred the case to the Intelligence Division. On March 2, 1964, he had his first meeting with petitioner (Tr. 16–17); he identified himself as a special agent and warned petitioner (Tr. 26):

> Under the Constitution of the United States you have the right to refuse to answer questions or make any statement which may tend to incriminate you under the laws of the United States. Anything you say, any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States.

Petitioner replied that he understood (Tr. 26). McGuire did not tell petitioner that it was a "criminal investigation" because at that point he did not know the extent of any understatements, did not know that criminal prosecution would be recommended, and regarded the case as "still in what I call a preliminary stage" (Tr. 17–19). He asked petitioner to prepare some expense analyses to enable him to determine whether or not petitioner had understated his

income (Tr. 16). In the several further meetings which occurred over the next eighteen months, petitioner produced the requested documents; no further warnings were given (Tr. 18–20).

At a meeting on October 14, 1965, McGuire asked petitioner if he would sign a statement. Petitioner asked "what direction the investigation was going" and whether he needed a lawyer. McGuire replied that it appeared that criminal prosecution would be recommended and that it was for petitioner to decide whether he needed a lawyer (Tr. 20–22). Petitioner signed no statement at this meeting, but returned two weeks later to do so; in the statement he signed he said that he knew his tax returns were incorrect when he filed them and that his purpose in filing them was to prevent a tax investigation of his brother (Tr. 22–25; Govt. Ex. 4). It was stipulated that McGuire would have testified that the statement embodied "oral admissions [petitioner made] during the course of several meetings" (Govt. Ex. 5; Tr. 31).

ARGUMENT

In substance, petitioner contends that his disclosures to the revenue agents were not made freely or voluntarily (1) because he was not told in so many words that the tax investigation was a criminal investigation (Pet. 8–10), and (2) because he had not been given the warnings prescribed for custodial interrogation in *Miranda* v. *Arizona*, 384 U.S. 436. The court of appeals correctly rejected both contentions.

1. Petitioner has failed to lay any record basis for his claim that he was deceived about the possibility of

criminal prosecution, inherent in this or any tax investigation, by Special Agent McGuire's failure explicitly to state that the investigation was criminal in nature.[1] At their first meeting, Agent McGuire warned petitioner that he had the right "to refuse to answer questions or make any statement which may tend to incriminate you" and that "any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States" (Tr. 26). After such a warning, no one could believe that there was no possibility of subsequent prosecution in which evidence or statements thereafter given might be used. Petitioner stated that he understood the warning (*ibid.*), and no reason appears for doubting that he did. Indeed, his awareness of his brother's questionable tax practices gives every reason to believe he did understand. The situation would have been no clearer had Agent McGuire added that his investigation was "criminal."

Moreover, petitioner's notion that all investigations conducted by special agents are "criminal" (Pet. 8–10; see also *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.)) is imprecise. Although in general special agents are assigned to a case once criminal prosecution appears to be a possibility, that appearance is often remote. The agent must determine, first, whether any tax is due, and if so, whether civil or criminal penalties or both or neither should be

[1] We do not interpret petitioner's argument (Pet. 8–10) as contending that Agent Brody (not a special agent) was remiss in failing to give appropriate warnings. In fact, the record does not show that any incriminating evidence was given to any agent prior to Special Agent McGuire's first meeting with petitioner.

recommended. See *DeMasters* v. *Arend,* 313 F.2d 79 (C.A. 9); *Kohatsu* v. *United States,* 351 F.2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011. Thus, Agent McGuire could not have informed petitioner in the spring of 1964, as he did in the fall of 1965, that it appeared a criminal prosecution would be recommended; the court of appeals correctly concluded (Pet. A3) that "the statements were not obtained by misrepresentation [or] fraud."

2. Nor is there merit in the argument (Pet. 10–14) that admissions made by petitioner to the agents should have been excluded because he was not warned of his right to counsel under *Miranda* v. *Arizona,* 384 U.S. 436. *Miranda* requires that warnings be given a person who "has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * *" (384 U.S. at 444). Although the admissions here were made in the office of the Internal Revenue Service, petitioner was neither in custody nor deprived of his freedom of action in any way when he provided the evidence in question. The courts of appeals have uniformly rejected contentions that the *Miranda* warning is required in such circumstances, and there is no reason for a different result here.[2] See, *e.g., Schlinsky* v. *United States,* 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States,* 385 F. 2d 908 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz,*

[2] *United States* v. *Turzynski,* 268 F. Supp. 847 (N.D. Ill.) and other district court cases which petitioner claims to be in conflict with these decisions (Pet. 11) have attracted no following in the courts of appeals.

401 F. 2d 219 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso,* 378 F. 2d 612 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[3] *United States* v. *Maius,* 378 F. 2d 716 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield,* 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States,* 380 F. 2d 832 (C.A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[4]

Here, petitioner was warned that he need not answer the agent's questions, and that whatever he said might be used against him in a criminal prosecution. Although he refers to "the pressures imposed upon a person when he is confronted with a visit from Government agents" (Pet. 13), he acknowledges in

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[3] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States,* 377 F. 2d 535 (C.A. 5).

[4] The other cases petitioner cites are without relevance here. In *Massiah* v. *United States,* 377 U.S. 201, a defendant under indictment was deceived into talking freely with a person acting as a government agent, thus effectively depriving him of the protection of counsel. *Windsor* v. *United States* 389 F. 2d 530 (C.A. 5), involved facts that amount to custody: Federal Bureau of Investigation agents cornered a known car thief in his hotel room and confronted him with the confession of his accomplice. In *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio), the witness divulged self-incriminating information under the compulsion of a grand jury subpoena. And in *Mathis* v. *United States,* 391 U.S. 1, as in *Miranda,* the petitioner was in custody when he made his disclosures.

this regard neither this warning, nor the lack of any compulsion on him to meet with McGuire. In sum, the compelling immediacy of custodial interrogation was lacking here; as the court of appeals observed (Pet. A3), petitioner was neither deceived nor in any way the victim of coercion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 951.

ROBERT M. MUSE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I. Negative Deception by Government Agents Held by Appellate Court Not to Be a Misrepresentation.

The government attempts to defend the special agent's failure to disclose the true purpose of his investigation (criminal) by contending: (1) "Petitioner has failed to lay any record basis for his claim that he was deceived. . . ." and (2) "Moreover, petitioner's notion that all investigations conducted by special agents are 'criminal' . . . is imprecise" (Br. in Opp. 4-5).[1] Said contentions,

[1] "Br. in Opp." references are to the government's "Brief in Opposition."

however, are legally insufficient and are not supported by the record.

First, the government's contention that **petitioner** has the burden of proving that his admissions and his consent to produce private records were **not** freely and voluntarily given is erroneous (Br. in Opp. 4-5). This Court has made it very clear that whenever the government relies upon consent, the government has the burden of proving that the consent was, in fact, freely and voluntarily given. The defendant does not have the burden of disproving consent. **Bumper v. North Carolina**, 88 S. Ct. 1788, 1792.

Further, as shown in petitioner's original petition for certiorari (Pet. 6-7) and in the government's Brief in Opposition (Br. in Opp. 3-4), the special agent knew that petitioner had understated his income when he first asked petitioner to prepare the expense analyses. However, the special agent **told** petitioner that "he wanted taxpayer to prepare some expense analyses to enable the agents to determine **whether or not he had understated his income**" (Tr. 16, Emphasis added). Thus, the record is clear that there was, in fact, affirmative deception by the special agent.

The government's claim that all investigations conducted by special agents are not criminal is quite surprising and certainly not supported by the record as far as this case is concerned. Special Agent McGuire testified that his duty was to investigate the criminal prosecutions (Tr. 24). Also, he testified that at the time of the first meeting with petitioner he knew that petitioner had understated his income, but did not know the amount of said understatement (Tr. 16-17). Clearly, petitioner was under criminal investigation from the first moment he met with Special Agent McGuire, if not before.

Additionally, the government's claim that it should not tell a prospective defendant in a criminal case that it is

conducting a criminal investigation for the reason that the agent might subsequently never recommend criminal prosecution is contrary to the teachings of **Miranda v. Arizona**, 384 U. S. 436 and other similarly decided cases. Under the government's rationale, policemen should never warn prospective defendants of their constitutional rights until after the state decides to prosecute. Such an interpretation of **Miranda** sets criminal jurisprudence back many years! We suggest that this court should review the apparent practices by special agents of "negative" deception in cases such as we have here. Further, the resolution of the important issue concerning the government's interpretation of **Miranda** warrants the grant of certiorari in this case.

II. Non-custodial Interrogation of a Defendant by Special Agents Where Inquiry Has Reached the Accusatory Stage Requires Miranda Warnings.

The numerous Federal District Court decisions that are in conflict with the decision below is good reason why this Court should review the practices of the special agents of the Internal Revenue Service in obtaining admissions and records from unknowing suspects.

The government, without giving any policy reasons, urges that special agents should not have to warn a prospective defendant of his right to counsel. Petitioner suggests that there are good reasons why a defendant should be advised of his right to counsel. One reason is so that counsel (assuming no waiver) can advise him of his other legal rights, such as the right to resist administrative summons to produce records. **Reisman v. Caplan**, 375 U. S. 440. Defense counsel might even tell a defendant that he is, in fact, the target of a criminal investigation and possible criminal charges! The government gives no logical reason why this should not be done.

The government claims that this Court's opinion in **Massiah v. United States**, 377 U. S. 201 and other cases cited by petitioner are without relevance here. Although **Massiah** concerned a post-indictment situation, the defendant was not in custody and was not coerced or tricked into giving admissions. The defendant merely misplaced his confidence in the wrong person. See **Hoffa v. United States**, 385 U. S. 293; **Lewis v. United States**, 385 U. S. 206. Thus, the case is relevant to the important issue here.

The government claims that the defendant was in custody in **Windsor v. United States**, 5 Cir., 389 F. 2d 530. However, a close reading of that opinion reveals that defendant was told by the FBI that he was not under arrest nor was he being detained in any way. Thus, the decision in **Windsor** is in direct conflict with the lower Court's decision here.[2]

CONCLUSION.

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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[2] Recently, the Federal District Court in the Middle District of Florida concluded that a suspect-witness was entitled to **Miranda** warnings at a grand jury hearing even though he was not in custody. **Lowe v. Carson**, 4 Cr. L. Rep. 2372 (1-10-69).